IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 21374 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DAVE SANATKUMAR KANTILAL - Petitioner(s)
Versus
HARSHABEN D MEHTA - Respondent(s)

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Appearance :
MR HASMUKH C PATEL for Petitioner(s) : 1
MR RAVINDRA SHAH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 21/08/2006

ORAL JUDGMENT

1. **Rule.** Mr. Ravindra Shah, learned advocate appears and waives service of notice of rule on behalf of the respondent.

2. By filing this petition under Articles 226/227 of the Constitution of India, the petitioner challenges the order dated 29.7.2005 rendered in Misc. Civil Application No.159 of 2000 by the learned Judge, Court No.17, City Civil Court, Ahmedabad by which the application filed by the petitioner under Order 9 Rule 4 of the Code of Civil Procedure ('the Code' for short) for restoration of the Civil Suit No. 3305 of 1989 has been dismissed.

3. Civil Suit No.3305 of 1989 filed by the petitioner before the City Civil Court, Ahmedabad, came to be dismissed under Order 9 Rule 3 of the Code vide order dated 11.2.2000 for want of prosecution. The petitioner thereupon preferred Misc. Civil Application No.159 of 2000 praying to restore the said

suit. The said application came to be rejected vide order dated 29.7.2005 giving rise to the present petition.

4. In this petition, it is, inter alia, averred that when the suit became ready for recording evidence, Mr. N.G. Butala, learned advocate of the petitioner has passed 'no instruction' pursis without informing the petitioner about the fact that the suit became ready for recording evidence and, therefore, the petitioner could not remain present before the court and as a result of it the suit came to be dismissed for want of prosecution. The petitioner has, therefore, prayed to quash and set aside the impugned order dated 29.7.2005 passed in Misc. Civil Application No.159 of 2000 and thereby to restore Civil Suit No. 3305 of 1989 to its original file for deciding it on merits after

recording evidence of both the parties.

5. The petition is contested by the respondent by filing reply affidavit wherein it is, inter alia, contended that the petitioner himself was not vigilant about his right. He remained absent on various dates. The petitioner has taken back the papers from his advocate in the year 1996 and thereafter also he did not inquire as to what had happened to his suit, for four years. Prior to passing of the impugned order of dismissal, the learned trial Judge had adjourned the matter twice, even then the petitioner did not remain present and ultimately the suit came to be dismissed. Therefore, according to the respondent, no leniency should be shown to the petitioner as the petitioner himself was not vigilant about his right. It is, therefore, prayed to dismiss the suit.

6. This court has considered the submissions advanced by Mr. HC Patel, learned advocate of the petitioner and Mr. Ravindra Shah, learned advocate of the respondent, perused the impugned order and the averments made in the petition as well as reply affidavit.

7. There is no dispute that the suit came to be dismissed vide order dated 11.2.2000 on the basis of the 'no instruction' pursis passed by Mr. Butala, learned advocate of the petitioner. It is also true that the petitioner has taken the papers back from his learned advocate in the year 1996. At that time the suit was not ready for recording the evidence. The suit became ready for recording the evidence in the year 2000 and, therefore, according to this court, the learned advocate who has passed the pursis of 'no instruction'

ought to have informed the petitioner by Registered Post A.D. letter about the latest status of the suit, which duty the learned advocate of the petitioner did not perform. It is settled principle of law that no matter should be thrown overboard without giving opportunity of hearing to the parties.

8. In aforesaid view of the matter, according to this Court, if the impugned order is quashed and set aside by restoring Civil Suit No.3305 of 1989 to its original file for deciding it on merits, the same would serve the ends of justice.

9. Seen in the above context, the petition deserves to be allowed by quashing and setting aside the impugned order by restoring Civil suit No.3305 of 1989 to its original file for deciding it on merits after recording

evidence of both the parties.

10. For the foregoing reasons, the petition succeeds and accordingly it is allowed with no order as to costs. The impugned order dated 29.7.2005 rendered in Misc. Civil Application No.159 of 2000 by the learned Judge, Court No.17, City Civil Court, Ahmedabad, is quashed and set aside, the result of which is that Civil suit No.3305 of 1989 is restored to its original file. The learned trial Judge is directed to decide the suit on merits after recording evidence of both the parties, strictly in accordance with law.

Rule is made absolute accordingly.

(A.M. Kapadia, J.)

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